SUPREME COURT, U. S.

No. 461

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

HARDY SALT COMPANY,

Petitioner,

vs.

STATE OF ILLINOIS and
STATE OF WEST VIRGINIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 377 F. 2d 768.

STATEMENT

The facts of the case are fully and accurately set forth in the opinion of the Court below printed as Appendix A to the Petition, pages 7-21.

ARGUMENT

1. Involved here is the application of the clear language of Section 5(b) of the Clayton Act which provides in part that

> "the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency" of a federal antitrust proceeding and for one year thereafter.

2. The Petitioner, Hardy Salt Company, was specifically named as a co-conspirator in a federal indictment and federal civil complaint involving substantially the same price-fixing conspiracy as is charged in the instant treble damage antitrust suits filed by the States of Illinois and West Virginia. These private suits name Hardy as one of the defendants and the Eighth Circuit held the limitations statute had been suspended as to Hardy during the pendency of the federal action plus one year.

3. The circuit and district court decisions cited on page 4 of the Petition to support the assertion of conflict with the opinion and judgment of the Eighth Circuit here, were all decided prior to the 1955 amendment to Section 5 of the Clayton Act and prior to this Court's decisions in *Minnesota Mining* v. *New Jersey Wood F. Co.*, 381 U.S. 311 (1965) (hereinafter "3M") and *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965) (hereinafter "Leh"). The lower court decisions relied upon by Petitioner were all based on the faulty interpretation that the separate *prima facie* and limitations provisions of Section 5 were co-extensive, had to be construed together

and, therefore, the limitations provision was applicable only to those parties subject to the collateral estoppel effect of the evidentiary provision and thus confined to the specifically named defendants in the federal action.

4. Section 5 of the Clayton Act was amended in several respects in 1955 and the evidentiary and limitations provisions separated into Sections 5(a) and 5(b). This Court had occasion to consider Section 5(b) in the *3M* and *Leh* cases and corrected the erroneous premise that formed the basis of the circuit and district court decisions cited by Petitioner. In *3M*, this Court gave recognition to the strong Congressional purpose embodied in Section 5(b) "to assist private litigants in utilizing any benefits they might cull from government antitrust actions" (317) and stressed that "private antitrust litigation is one of the surest weapons for effective enforcement" (318). The Court further discussed the substantial textual differences of Sections 5(a) and 5(b) (316) and held that these two subsections "are governed by different considerations as well as congressional policy objectives" (318). That Section 5(b) serves a more comprehensive function which reaches "far beyond the specific and limited benefits accruing to them [private antitrust plaintiffs] under §5(a)" (320).

The Court in *Leh* dealt with the question of whether a private antitrust action was in whole or in part based upon matters complained of in a federal action. In that connection the Court rejected the necessity of a complete identity of parties in the federal and private actions in order to satisfy the requirements of Section 5(b) suspending the limitations statute and pointed out on page 64:

> "On the other hand, some of the conspirators whose activities injured the private claimant may have been

> too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."

The suspension of the limitations statute as against a named co-conspirator though not a defendant in a federal proceeding was not directly involved in the *Leh* decision. The court, however, did determine that Section 5(b) suspension did accrue for private actions even though named co-conspirators were included in, or comprised the sole, private defendants. Obviously no Section 5(b) benefit could accrue unless the suspension was applicable to the federally named co-conspirators.

5. The decision of the Eighth Circuit follows and is in harmony with the statutory construction announced by this Court in *3M* and *Leh*. The faulty premise previously used to misconstrue and restrict the clear meaning of the language of Section 5(b) has been rejected. The issue involving the construction of Section 5(b) has been resolved by this Court in *3M* and *Leh*. As so resolved the Eighth Circuit has followed this Court's dictates. There is no reason for this Court now to re-examine the principles previously announced in *3M* and *Leh*.

6. Petitioner also calls to the Court's attention as a reason for granting the writ, the decision of the District Court for the District of New Jersey rendered on September 19, 1966, in *New Jersey* v. *Morton Salt Co.*, Civ. 687-65. In that case Judge Lane came to an opposite conclusion but based his decision on the fact that an earlier District Judge had so ruled. Judge Lane said: "[B]y comity and tradition, brother judges of a multiple-judge district court customarily follow a previous decision of a brother judge upon the same question." (Transcript of Hearing, September 19, 1966, pages 47-48.)

Judge Lane also stated: "Should higher authority adopt in whole or in part the conclusions that Judge Larson has reached, appropriate relief may be granted by this Court. . . ." (Transcript, *supra*, page 51).

The Petition for Certiorari should be denied.

Respectfully submitted,

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